89-1231

No._____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

DAVID SUIFONG FAN,

Petitioner,

vs.

~~UNITED STATES OF AMERICA,~~
STATE OF MINNESOTA

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether Minnesota Statutes Section 617.246 violates the first and fourteenth amendments by imposing strict criminal liability upon anyone promoting, employing, using or permitting a person under the age of 18 to engage in a sexual performance by precluding a mistake of age defense.

PARTIES TO THE PROCEEDING

The parties to the proceeding are as follows:

David Suifong Fan, Petitioner,

vs.

State of Minnesota, Respondent.

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OPINION BELOW

The opinion of the Minnesota Court of Appeals, upon which the Minnesota Supreme Court declined further review, is reported at 445 N.W.2d 243 (Minn. Ct. App. 1989), pet. for rev. denied October 31, 1989, and is reprinted in Appendix A. The Minnesota Supreme Court's order denying further review is reprinted at A-9.

JURISDICTON

The judgment of the Minnesota Court of Appeals was filed September 5, 1989. Appendix A. The Minnesota Supreme Court entered its order October 31, 1989 denying petitioner's request for further judicial review. This petition was filed within ninety days of that date. This Court's jurisdiction is invoked under Title 28 United States Code Section 2101(d).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The United States Constitution provides:

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment XIV

. . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Minnesota Statutes Section 617.246 provides in pertinent part as follows:

Subdivision 1. Definitions. (a) For the purpose of this section, the terms defined in this subdivision have the meanings given them.

(b) "Minor" means any person under the age of 18.

(c) "Promote" means to produce, direct, publish, manufacture, issue, or advertise.

(d) "Sexual performance" means any play, dance or other exhibition presented before an audience or for purposes of visual or mechanical reproduction which depicts sexual conduct as defined by clause (e).

(e) "Sexual conduct" means any of the following if the depiction involves a minor:

(i) An act of sexual intercourse, normal or perverted, actual or simulated, including genital-genital, anal-genital, or oral-genital intercourse, whether between human beings or between a human being and an animal.

(ii) Sadomasochistic abuse, meaning flagellation, torture, or similar demeaning acts inflicted by or upon a person who is nude or clad in undergarments or in a revealing costume, or the condition of being fettered, bound or otherwise physically restrained on the part of one so clothed.

(iii) Masturbation or lewd exhibitions of the genitals.

(iv) Physical contact or simulated physical contact with the clothed or unclothed pubic areas or buttocks of a human male or female, or the breasts of the female, whether alone or between members of the same or opposite sex or between humans and animals in an act of apparent sexual stimulation or gratification.

(f) "Work" means an original or reproduction of a picture, film, photograph, negative, slide, videotape, videodisc, or drawing.

Subd. 2. Use of minor. It is unlawful for a person to promote, employ, use or permit a minor to engage in or assist others to engage in posing or modeling alone or with others in any sexual performance if the person knows or has reason to know that the conduct intended is a sexual performance.

Any person who violates this subdivision is guilty of a felony and may be sentenced to imprisonment for not more than five years or to payment of a fine of not more than $10,000 for the first offense and $20,000 for a second or subsequent offense, or both.

* * *

Subd. 5. Consent; mistake. Neither consent to sexual performance by a minor or the minor's parent, guardian, or custodian nor mistake as to the minor's age is a defense to a charge of violation of this section.

STATEMENT OF THE CASE

Petitioner was charged in a two count complaint with employing and permitting a person under the age of 18 to engage in a sexual performance in violation of Minnesota Statute Section 617.246, subdivision 2. He was convicted on both counts September 23, 1988, following a jury trial before the Honorable Thomas Mott, Ramsey County District Court.

At all relevant times petitioner was the owner of the Belmont Club, located on University Avenue in St. Paul (T. 152).[1] The Belmont Club was licensed to serve liquor and present live entertainment in the form of nude dancing (T. 27, 38-39, 73). Performers at the Belmont Club danced on a stage surrounded by glass which was located in a corner of the establishment (T. 38-39).

On November 14, 1987, T.M. auditioned with Dancing Angels, an agency that provided dancers to the Belmont Club (T. 139-40). Nancy Osterman was the manager of Dancing Angels and responsible for auditioning and hiring the dancers (T. 143-44). Part of Ms. Osterman's responsibility included determining the applicant's age. Osterman did not hire dancers without obtaining some form of identification indicating the applicant's age (T. 151).

At the conclusion of T.M.'s audition, Osterman asked T.M. for some identification indicating her age (T. 43). T.M. said she had left her identification at home and Ms. Osterman told her to bring it with her when she next returned to the club. T.M. later furnished Ms. Osterman with an identification card indicating that she was 18 years of age (T. 43-44). T.M. began dancing at the Belmont Club in December of 1987 (T. 39-40). T.M. had very limited contact with petitioner, the owner of the Belmont Club (T. 59-60).

On February 8, 1988, a St. Paul police officer went to the Belmont Club to arrest T.M. on a juvenile probation violation (T. 69-72, 94). T.M.

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[1] "T-X" refers to pages in the transcript of the trial proceedings September 20-23, 1988.

testified that she was fourteen years old on February 8, 1988, the day she was arrested (T. 37). She admitted that at the time of her audition she told Ms. Osterman she was eighteen years old and that she later supplied Ms. Osterman with an identification card indicating that she was eighteen years old (T. 44, 58, 141). Following petitioner's conviction, T.M. told the probation officer who was conducting petitioner's presentence investigation that she was convinced that petitioner did not know that she was under the age of eighteen (T. 290). She told the probation officer that she looked significantly older than she actually was and verified that she had used false identification to be hired (T. 289).

In a related administrative proceeding concerning the effect of the underage dancer upon petitioner's license to operate the Belmont Club, the administrative law judge found that, "[T.M.] looks older than her age and could be mistaken for an eighteen year old." (T. 287).

The jury was instructed that any mistake by petitioner as to T.M.'s age was not a defense to the pending charges (T. 164, 247). During jury deliberations, in response to a question raised by the jurors, the court again instructed the jurors that mistake of age was not a defense (T. 262, 264). Shortly thereafter petitioner was convicted (T. 267).

In a post trial motion filed October 10, 1988, seeking to have the judgment vacated, or judgment of acquittal entered, or a new trial, petitioner cited the unconstitutionality of Minnesota Statutes Section 617.246 as one of the grounds for the relief sought. The trial court denied all petitioner's post trial motions on November 23, 1988 (T. 277) and imposed sentence upon petitioner.

The issue regarding the constitutionality of the Minnesota Statute was again raised in the Minnesota Court of Appeals. That court held that the first amendment does not preclude strict liability under Minnesota Statutes Section 617.246 and the statute does not "substantially" chill first

amendment rights. *State v. Fan*, 445 N.W.2d 247-48 (Minn. Ct. App. 1989). See A-8. Petitioner sought review of the Court of Appeals' decision in the Minnesota Supreme Court and that petition for review was denied. See Appendix B at A-9.

REASONS FOR GRANTING WRIT

Minnesota's statute which imposes strict criminal liability upon anyone who promotes, employs, uses or permits a minor to engage in a sexual performance, by precluding the defense of good faith mistake as to age, violates the first amendment by chilling constitutionally protected expressive conduct and denies the accused due process and fundamental fairness at trial. U.S. Const. amends. I and XIV.

The ruling of the Minnesota Court of Appeals, which was upheld by the state supreme court, that the first amendment does not preclude strict liability and that the "compelling state interest requires toleration of the statute's insubstantial dulling effect," (445 N.W.2d 247-48) conflicts with decisions of this Court and a recent decision of the Ninth Circuit Court of Appeals in which that Court held that the first amendment requires a good faith mistake of age defense to a charge of employing, using, persuading, inducing, enticing or coercing a minor to engage in sexually explicit conduct in a film. *See United States v. United States District Court*, 858 F.2d 534, 542 (9th Cir. 1988).

Nude dancing is expressive conduct protected by the first amendment. *See Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 66 (1981); *Doran v. Salem Inn*, 422 U.S. 922, 932 (1975); *California v. LaRue*, 409 U.S. 109, 115, 118 (1972). According to the United States Supreme Court, nude dancing is "within the limits of the constitutional protection of freedom of expression" even if it is "*lewd* or naked dancing." *Id.* (emphasis supplied). By imposing strict liability upon persons who promote, employ, use, or permit nude dancing, the State of Minnesota is placing business owners and managers in a position where they must refrain from hiring

persons to perform nude dancing to avoid the risk of strict criminal liability. Even if the effect of the statute is that owners and managers proceed timidly and only restrict their hiring to those persons who are so obviously past their youth so as not to possibly be 18 years or younger, the effect of the statute is nevertheless chilling on this protected conduct.

A generally recognized tenet of criminal law is that an honest mistake of fact negates criminal intent, when a defendant's acts would be lawful if the facts were as he supposed them to be. *United States v. Barker*, 546 F.2d 940, 946 (D.C. Cir. 1976). This principle is especially true in first amendment contexts. In *Smith v. California*, 361 U.S. 147 (1959), this Court reversed a conviction under an ordinance prohibiting the possession of any obscene book in a place where books were sold. Noting that the ordinance imposed strict or absolute criminal liability without requiring any element of scienter, the Court declared it invalid under the first and fourteenth amendments because of its potential to inhibit constitutionally protected expression. 361 U.S. at 151.

Observing that "[t]he existence of a mens rea is the rule, rather than the exception to, the principles of Anglo-American criminal jurisprudence," the *Smith* Court acknowledged that a legislature's power to create strict liability criminal offenses is subject to limitations, even when no first amendment freedoms are involved. *Id.* at 150 (quoting *Dennis v. United States*, 341 U.S. 494, 500 (1951)). Distinguishing strict liability in the context of food and drug legislation, the *Dennis* Court commented: "There is no specific constitutional inhibition against making the distributors of food the strictest censors of their merchandise, but the constitutional freedom of speech and of the press stand in the way of imposing a similar requirement on the bookseller." *Id.* at 152-53. According to *Smith*, when freedom of expression is involved, the absence of a scienter requirement "tends to impose a severe limitation on the public's access to constitutionally protected matter." *Id.* at 153.

Fifteen years later, in *Hamling v. United States*, 418 U.S. 87 (1974), this Court affirmed a conviction for mailing obscene material because the constitutionally required element of scienter was satisfied by proof, beyond a reasonable doubt, that the defendant "had knowledge of the contents of the material he distributed, and that he knew the character and nature of the materials." *Id.* at 123. Adhering to *Smith*, the *Hamling* Court reiterated: "The Constitution requires proof of scienter to avoid the hazard of self-censorship of constitutionally protected material and compensate for the ambiguities inherent in the definition of obscenity." *Id.* (quoting *Mishkin v. New York*, 383 U.S. 502, 511 (1966)).

In the related context of prohibiting sales of pornography to minors, the constitutionality of such prohibitions has hinged upon whether they included an age scienter requirement. In *Ginsberg v. New York*, 390 U.S. 629, 643-45 (1968), for example, this Court upheld the constitutionality of an allegedly vague statute prohibiting the sale of "girlie" magazines to minors because the prohibition was expressly limited to sales made "knowingly." The statute involved in *Ginsberg* specifically required knowledge of "the age of the minor, provided however, that an honest mistake shall constitute an excuse from liability . . . if the defendant made a reasonable bona fide attempt to ascertain the true age of the minor." *Id.* at 643-44.

Even in the context of laws prohibiting child pornography, the Supreme Court has made it clear that "criminal responsibility may not be imposed without some element of scienter on the part of the defendant." *New York v. Ferber*, 458 U.S. 747, 765 (1982). Yet, as a federal district court recently recognized, *Ferber* did not address the particular issue of whether an element of scienter pertaining to the minor's age is constitutionally required in prohibitions against child pornography. *See United States v. Kantor*, 677 F.Supp. 1421, 1424 (C.D. Cal. 1987).

In petitioner's prosecution under Minnesota Statutes Section 617.246, not only was the State not required to establish an element of scienter,

but petitioner was precluded from raising the defense of good faith mistake as to age. The holding of the Minnesota courts that this does not violate the first amendment is in direct conflict with the holding of the Ninth Circuit Court of Appeals on an identical issue in *United States v. United States District Court*, 858 F.2d 534 (9th Cir. 1988). The Minnesota Court found the rationale of the Ninth Circuit "instructive" but not controlling. *State v. Fan*, 445 N.W.2d at 247. See A-7.

First, procedurally, in *United States v. Kantor*, 677 F.Supp. 1421 (C.D. Cal. 1987), a federal district court held that due process of law entitles a defendant charged with violating the federal child pornography laws to present evidence supporting a mistake of fact defense, in an effort to prove that he acted on the basis of a good faith, reasonable mistake as to the minor's age. The *Kantor* Court observed that due to the limited scope of such a defense, its recognition would not seriously undermine the deterrent value of the child pornography laws. *Id.* at 1433-34. More importantly, constitutional notions of fundamental fairness require recognition of such a defense. *Id.* at 1434-35.

The government sought a Writ of Mandamus from the Ninth Circuit Court of Appeals in the *Kantor* case and the Ninth Circuit Court affirmed the district court's ruling in *United States v. United States District Court*, 858 F.2d 534 (9th Cir. 1988). The Ninth Circuit Court recognized that although a defendant's awareness of the minor's age is not a constitutionally required element of the federal prohibition against child pornography, the first amendment requires that a child pornography defendant be permitted to raise a reasonable mistake of age defense. *Id.* at 537-38, 542. Observing that the age of the minor "defines the boundary between speech that is constitutionally protected and speech that is not," the issue presented to the court of appeals was whether a child pornography defendant may constitutionally be subjected "to strict liability for misjudging the precise location of that boundary." *Id.* at 538-39.

After acknowledging the inherent fallibility of age determinations, the Ninth Circuit Court concluded that the first amendment precludes the imposition of strict liability in the context of child pornography prosecutions. *United States v. United States District Court*, 858 F.2d at 540-41. Accordingly, the court ruled that the first amendment requires recognition of a child pornography defendant's reasonable mistake of age defense. *Id.* at 542. Like the *Kantor* court, the court of appeals observed that such a defense would not significantly hamper the protection of minors from child pornography. *Id.* at 542-43. Finally, the Ninth Circuit commented: "As to those rare cases where otherwise culpable defendants may be exonerated on the basis of a reasonable mistake of age defense, we can only note that even as compelling a societal interest as the protection of minors must occasionally yield to specific constitutional guarantees." *Id.* at 543.

Under the rationale employed in *Kantor*, Minnesota Statutes Section 617.246, subdivision 5, violated petitioner's constitutional right to due process of law by preventing him from raising a good faith, reasonable mistake of age defense. U.S. Const. amend. XIV. Under the related rationale employed in *United States District Court*, the Minnesota statutory provision violated petitioner's constitutionally protected freedom of expression. U.S. Const. amends. I and XIV.

The Minnesota Court of Appeals decision, which was left undisturbed by the Minnesota Supreme Court, is in direct conflict with the Ninth Circuit Court's holding that the first amendment requires that the accused be permitted to raise a mistake of age defense in prosecutions under a statute nearly identical to the Minnesota statute at issue here.

CONCLUSION

This petition for writ of certiorari should be granted to review the constitutionality of Minnesota Statute Section 617.246, which strict liability provision conflicts with prior decisions of this Court on first amendment protections generally and the holding of the Ninth Circuit Court specifically in *United States v. United States District Court*, 858 F.2d 534 (9th Cir. 1988).

A decision by this court is necessary to resolve conflicting interpretations of the first amendment protections of the accused in criminal prosecutions involving use of minors in otherwise protected expressive conduct.

Respectfully submitted,

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APPENDIX

APPENDIX A

STATE OF MINNESOTA
IN COURT OF APPEALS

CX-88-2467

Ramsey County — Lansing, Judge

STATE OF MINNESOTA,

Respondent,

vs.

DAVID SUIFONG FAN,

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Filed: September 5, 1989

Office of Appellate Courts

SYLLABUS

Minn. Stat. § 617.246, subd. 2 (1986), prohibiting the use of minors in sexual performances, is not substantially overbroad or unconstitutionally vague.

Affirmed.

Heard, considered and decided by Lansing, Presiding Judge, Crippen, Judge, and Thoreen, Judge.*

OPINION

LANSING, Judge

This appeal challenges the constitutionality of Minn. Stat. § 617.246, subd. 2 (1986), which makes it a felony for a person to employ or permit a minor to engage in a sexual performance. Holding that the statute is not facially overbroad or unconstitutionally vague, we affirm the trial court's denial of appellant's post-trial motions.

FACTS

A Ramsey County jury convicted David Fan of employing and permitting 14-year-old T.M. to engage in a sexual performance. The trial judge sentenced Fan to concurrent sentences of a year and a day and stayed execution on specific conditions including a 30-day workhouse sentence.

The convictions arose out of Fan's activities as owner and operator of a St. Paul bar, the Belmont Club, which features nude dancers. He is also an officer and director of Dancing Angels, an agency that provides nude dancers for the Belmont and other local liquor establishments. Dancing Angels is managed by Nancy Osterman who hires the dancers subject to Fan's approval.

Dancing Angels hired T.M., then 13 years old, after an audition before Osterman and Fan. When asked for identification she stated she

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* Acting as judge of the Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 2.

left it at home. She was offered and signed an employment contract without identification and was told to bring identification with her when she returned for work. T.M. later produced an Unbank Card listing her age as 18. The Unbank Card, admitted into evidence, is used for check cashing identification and is obtained by filling out a form for which no documentation is required.

The evidence supporting the jury's determination that T.M. engaged in a sexual performance included the testimony of police officers Lawrence Rogers and Charles Lutchen, who observed T.M. perform at the Belmont on a stage in a corner behind glass and in front of mirrors. The stage is positioned at the same level as a narrow bar that is surrounded by stools where customers sit directly in front of the glass and slip money through narrow slits between the panel of glass. T.M. performed a 20-minute routine that included dancing to three songs.

T.M. performed the first dance with a halter wearing a short mini-skirt which she lifted above her waist as she squatted down very close to the glass revealing her buttocks and pubic area. During the second dance T.M. wore only a halter top and high-heeled shoes and squatted near the glass with her knees spread, thrusting her pelvis and hips forward toward the patrons. In the third song T.M., wearing only her shoes, lay on her back with her knees up and spread apart, raising her hips to thrust her pubic area forward toward the patrons. During both the second and third songs she touched her breasts and pubic area with her fingers and partially inserted one finger into her vaginal area.

The trial court instructed the jury that mistake as to age was not a defense to the charges. After the trial Fan brought post-trial motions challenging the constitutionality of the statute and the court's preclusion of a fact defense based on mistake of age.

ISSUE

Is Minn. Stat. § 617.246, subd. 2 (1986) facially overbroad or unconstitutionally vague?

ANALYSIS

Overbreadth

Fan challenges the constitutionality of Minn. Stat. § 617.246[1] on the grounds that it is overbroad. He asserts that the statute's definitions of sexual performance would prohibit protectible First Amendment expression such as plays and movies addressing incest or pictorial representation in books promoting celibacy as a method of disease prevention.

Although a litigant is normally limited to constitutional challenges based on the facts at issue, a claim of first amendment overbreadth extends to potentially unconstitutional applications of a statute. *New York v. Ferber*, 458 U.S. 747 (1982), *Broadrick v. Oklahoma*, 413 U.S. 601, 610 (1973). This broader scope of review is a necessary counter balance when criminal sanctions restrict the ordinary review process available to determine legally protected expression. *State v. Krawsky*, 426 N.W.2d 875 (1988) (citations omitted).

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[1] The statute provides, in relevant part:

617.246. Use of minors in sexual performance prohibited.

Subd. 2. Use of minor. It is unlawful for a person to promote, employ, use or permit a minor to engage in or assist others to engage in posing or modeling alone or with others in any sexual performance if the person knows or has reason to know that the conduct intended is a sexual performance.

Subd. 1. Definitions. * * *.

(d) "Sexual performance" means any play, dance or other exhibition presented before an audience or for purposes of visual or mechanical reproduction which depicts sexual conduct as defined by clause (e).

(e) "Sexual conduct" means any of the following if the depiction involves a minor:

* * *

(iii) Masturbation or lewd exhibitions of the genitals.

(iv) Physical contact or simulated physical contact with the clothed or unclothed pubic areas or buttocks of a human male or female, or the breasts of the female, whether alone or between members of the same or opposite sex or between humans and animals in an act of apparent sexual stimulation or gratification.

Overbreadth must be substantial before a statute will be declared invalid. If a statute's legitimate reach "dwarfs its arguably impermissible applications," it will not be held facially invalid. *Ferber*, 458 U.S. at 774. This is particularly true when conduct and not merely speech is involved. *Ferber*, 458 U.S. at 770, *Broadrick*, 413 U.S. at 615.

In *Ferber*, the United States Supreme Court, analyzing a similar statute prohibiting distribution of material depicting sexual performances by minors, held the statute was not invalid for overbreadth. The court concluded that the statute permissibly prohibited the use of children as subjects of pornographic materials and that this legitimate application of the statute greatly overshadowed the possibility that the statute might prohibit protected educational, medical, or artistic works involving sexual performances by minors.

We are persuaded that the reasoning in *Ferber* applies. The purpose and language of Minn. Stat. § 617.246 prohibits the use of minors in sexual performances. Although it is marginally possible that the statute could reach a valid first amendment application, the statute does not substantially prohibit constitutionally protected expression. As the *Ferber* court concluded, any actual infringement of first amendment rights which may arise should be addressed on a case by case basis. *Ferber*, 458 U.S. at 775.

Vagueness

Fan also challenges the statute as unconstitutionally vague. He contends the phrase "lewd exhibition of the genitals" in subd. 1(e)(iii) is not sufficiently clear to draw a line between lawful and unlawful conduct, particularly when knowledge of the age of the minor is not an element of the offense.[2]

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[2] Subd. 5 of the statute provides:

> Consent; mistake. Neither consent to sexual performance by a minor or the minor's parent, guardian, or custodian, nor mistake as to the minor's age is a defense to a charge of violation of this section.

Minn. Stat. § 617.246, subd. 5.

The void-for-vagueness doctrine requires that penal statutes define offenses with sufficient definiteness that ordinary people can understand what conduct is prohibited. *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). A law is impermissibly vague if it fails to draw a reasonably clear line between lawful and unlawful conduct. *Smith v. Goguen*, 415 U.S. 566, 574-78 (1974).

This court has previously determined that a criminal statute using the terms "lewdness" and "lascivious behavior" is not void for vagueness. *Mankato v. Fetchenhier*, 363 N.W.2d 76 (Minn. Ct. App. 1985). Fan maintains that proscriptions against "lewd conduct" have been invalidated as insufficiently definite. Whether "lewd" or "lewd conduct" has the required specificity to withstand constitutional challenge need not be readdressed here. The statute at issue uses the word "lewd" followed by the more precise term, "exhibition of the genitals." This identical language was upheld in *Ferber* as sufficiently describing a category of material for proscription. *Ferber*, 458 U.S. at 765. The court stated: "The term lewd exhibition of the genitals is not unknown in this area and, indeed, was given in *Miller* as an example of a permissible regulation." *Ferber*, 458 U.S. at 765, *quoting Miller v. California*, 413 U.S. at 25.

Fan claims that any vagueness in the statute is exacerbated by the provision that mistake as to the minor's age is not a defense.[3] The Supreme Court has recognized that the constitutionality of a vague statutory standard is closely related to whether that standard incorporates a requirement of "mens rea." *Colautti v. Franklin*, 439 U.S. 379 (1979). This pro-

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[3] Honest belief that child was over the age of majority does not constitute a defense of constitutional dimension. *United States v. Brooks*, 841 F.2d 268, 269 (1988). *Nelson v. Moriarty*, 484 F.2d 1034 (1973). The effect of mens rea and mistake on state criminal law has generally been left to the discretion of the state. *See e.g. Powell v. Texas*, 392 U.S. 514, 535-36 (1968), *Lambert v. California*, 355 U.S. 225, 228 (1957). Minnesota courts have held that denial of opportunity to present a reasonable mistake-of-age defense is not unconstitutional. *State v. Morse*, 161 N.W.2d 609 (1968); *State v. Dombroski*, 145 Minn. 278, 176 N.W. 985 (1920).

ceeds from a concern that the statute may punish "without warning an offense of which the accused was unaware." *Screws v. United States*, 325 U.S. 91, 101-02 (1945).

We agree that intent is important if the statutory standard is uncertain. Here the statute specifically requires that a person subject to its enforcement must *know or* [*have*] *reason to know* that the conduct *intended* is a sexual performance." Minn. Stat. § 617.246, subd. 2 (emphasis added). Intent in this case is specifically required as it relates to the challenged standard of "lewd exhibition of genitals."

The question, simply stated, is whether the term "lewd exhibition of genitals" reasonably gave Fan notice that it was illegal to employ a fourteen year old girl to perform the three dances described. We conclude that the statute gave adequate warning of the proscribed conduct and marked boundaries sufficiently distinct to administer and enforce the law.

Finally, in a challenge that implicates both the first amendment and due process protections, Fan argues that exclusion of mistake of age as a defense seriously chills protected speech. At least one federal circuit court, examining a similar child pornography statute, has determined that the first amendment requires a reasonable mistake of age defense. *United States v. United States District Court for Central District of California*, 858 F.2d 534 (9th Cir. 1988).

Although we find the reasoning of this case instructive, we do not find it controlling. The elements to be considered in balancing the competing interests are not the same. In *Ferber* the court recognized the presentation and production of child pornography bears heavily and permanently on the welfare of children. *Ferber*, 458 U.S. 756. The protection of our young from sexual abuse may be among the most important functions of a civilized society. *United States v. United States District Court*, 858 F.2d at 541. Although the Ninth Circuit court recognizes this compelling interest, it casts the balance in form of protected expression — in that

case production of salacious movies. The statute construed by the Ninth Circuit was silent on the issue of age scienter. Here we have a clearer statement of public policy because the Minnesota legislature specifically excluded the mistake-of-age defense.

Second, the "speech" which might be chilled by this application of the statute involves conduct, rather than pure speech.

> "* * * [T]he states have greater power to regulate non-verbal, physical conduct than to suppress depictions or descriptions of the same behavior." *Koppinger v. City of Fairmont*, 248 N.W.2d 708, 712 (Minn. 1976), *quoting Miller v. California*, 413 U.S. 15, 26 n.8.

See also Broadrick, 413 U.S. at 615.

Employers of erotic dancers must simply direct their energies toward a more thorough investigation of their dancers' ages.[4] Minnesota's compelling state interest requires toleration of the statute's insubstantial chilling effect. We conclude that the first amendment does not preclude strict liability under § 617.246 as it relates to these facts.

DECISION

Minn. Stat. § 617.246 is not facially overbroad because it does not substantially prohibit constitutionally protected expression. Minn. Stat. § 617.246, subd. 2, contains a determinable standard of conduct and is not unconstitutionally vague nor does it substantially chill first amendment rights.

Affirmed.

HARRIET LANSING

August 29, 1989.

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[4] It is noteworthy that all of the evidence presented or offered showed that Fan engaged in an extremely cursory investigation of age in the present case. The only age identification provided by T.M. was an Unbank Card.

APPENDIX B

STATE OF MINNESOTA
IN SUPREME COURT

CX-88-2467

STATE OF MINNESOTA,

Respondent,

vs.

DAVID SUIFONG FAN,

Appellant.

ORDER

Based upon all the files, records and proceedings herein,

IT IS HEREBY ORDERFD that the petition of David Suifong Fan for further review be, and the same is, denied.

IT IS FURTHER ORDERED that the request of Eve White to file an amicus curiae brief in the above-entitled matter be. and the same is denied.

Dated: 10-31-89.

BY THE COURT:
PETER S. POPOVICH
Chief Justice

APPENDIX C

MINNESOTA SUPREME COURT

CX-88-2467

STATE OF MINNESOTA,

Respondent,

vs.

DAVID SUIFONG FAN,

Appellant.

NOTICE OF APPEAL
TO UNITED STATES SUPREME COURT

Petitioner, David Suifong Fan, hereby gives notice pursuant to Rule 10, United States Supreme Court Rules, that he is appealing from the judgment of the Court of Appeals in *State v. Fan*, 445 N.W.2d 243 (Minn. Ct. App. 1989) filed September 5, 1989, a case upon which this Court declined further review on October 31, 1989.

Specifically, petitioner appeals from the ruling by the Minnesota Courts that the first amendment does not preclude strict liability under Minnesota Statute Section 617.246. *See State v. Fan*, 445 N.W.2d at 247-48.

Respectfully submitted,

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